

DOCUMENT RESUME

02353 - [A1372356]

[Subcontractor Protest against Use of Buy American Clause and Price Escalation Rates]. B-187252. May 10, 1977. 11 pp.

Decision re: Brown Boveri Corp.; by Paul G. Dembling (for Elmer B. Staats, Comptroller General).

Issue Area: Federal Procurement of Goods and Services (1900).  
Contact: Office of the General Counsel: Procurement Law II.  
Budget Function: General Government: Other General Government (806).

Organization Concerned: Energy Research and Development Administration; Westinghouse Electric Co.; General Electric Co.

Authority: Buy American Act; 41 C.F.R. 9-59.004; 41 C.F.R. 9-6.100(b); F.P.R. 1-6.1; F.P.R. 1-6.102; F.P.R. 1-6.104-5. 46 Comp. Gen. 784. 46 Comp. Gen. 791. 48 Comp. Gen. 384. 51 Comp. Gen. 195. 41 Comp. Gen. 70. 41 Comp. Gen. 73. 54 Comp. Gen. 165. 54 Comp. Gen. 767. Keco Industries Inc., v. United States, 492 F.2d 1200 (Ct. Cl. 1974).

A protest against an award for a subcontract alleged that a Buy American clause in the proposal was erroneous and that price escalation rates were improperly calculated. It was requested that the award be set aside or that the protester receive proposal preparation costs. The subcontractor's protest was considered because of agency involvement. The application of the Buy American Act to "end product" was considered proper, and methods used for calculating price escalation were found reasonable. The protest and claim for costs were denied. (HTW)

2356

02353

## DECISION

THE COMPTROLLER  
OF THE UNITED STATES  
WASHINGTON, D. C. 20548F248XLEK  
PL 2  
GENERAL STATES  
C. 20548

FILE: B-187252

DATE: May 10, 1977

MATTER OF: Brown Boveri Corporation

## DIGEST:

1. GAO will consider subcontractor protest where agency directed its prime contractor to conduct award evaluation for first-tier subcontractor.
2. Item to be delivered under subcontract containing Buy American clause constitutes an end product for purpose of Buy American Act even though item is to be incorporated into ultimate end product by prime contractor.
3. Agency refusal to waive Buy American Act evaluation for foreign items is not reviewable by GAO.
4. Prime contractor was not required to negotiate with potential subcontractor as to method it used for calculating price escalation. Although method used by prime was different from that used by proposed subcontractor, GAO cannot object so long as it was reasonable and consistent with RFP.
5. Allegation that time frame for calculating price escalation should be different from that used in evaluating protester's proposal is denied since time frame used is that specified in RFP.
6. Protester's allegation of fundamental error in calculation of price escalation is not sustained by record which shows that evaluation was reasonable and that even if evaluation were conducted as requested by protester its proposal would not be low.
7. Claim for proposal preparation costs is denied where lack of good faith, arbitrariness or capriciousness is not shown.

Brown Boveri Corporation (BBC) protests the award to the General Electric Company of a contract to supply a sodium pump-drive system for the Clinch River Breeder Reactor Demonstration Plant which is being constructed pursuant to a Government-private industry cooperative arrangement to which the Energy Research and Development Administration (ERDA) is a party. The BBC protest rests on three basic allegations: (1) the addition of the Buy American Act differential to its proposal was erroneous; (2) the failure to inform BBC prior to award that the price escalation rate to be applied to its proposal was higher than its own estimate of 17.9 percent violated the requirement

of full and fair negotiation; and (3) the price escalation rate of 27.5 percent applied to the BBC proposal was incorrect. BBC requests that the award be set aside or, alternatively, that it be awarded its proposal preparation costs.

Contract E (11-1)-2395 was awarded to Westinghouse Electric Corporation to construct a liquid metal fast breeder reactor demonstration plant at Clinch River, Tennessee. Westinghouse, in turn, subcontracted the heat transfer system to General Electric. The system is being built by the Fast Breeder Reactor Department of General Electric's Energy Systems Technology Division (GE Sunnyvale).

On June 20, 1975, GE Sunnyvale issued a request for proposals (RFP) for six sodium pump-drive systems for use in the heat transfer system, together with one prototype pump-drive motor assembly. Two firms submitted proposals in response to this RFP: BBC and General Electric, Large Machinery and Generator Division (GE Schenectady). Since one division of GE was competing for an award to be made by another division of the same company, ERDA directed that the responsibility for evaluation of the proposals be transferred to Westinghouse.

Negotiations were conducted with both BBC and GE Schenectady from September 1975 until February 1976. Best and final offers were received on February 12, 1976. Westinghouse reviewed and evaluated the proposals and made a recommendation on March 26, 1976 that the Clinch River Breeder Reactor Project Office approve the selection of the GE Schenectady proposal. The Project Office recommended endorsement of the Westinghouse selection to ERDA headquarters on April 7, 1976 and on April 29, 1976 the ERDA Administrator approved the selection of GE Schenectady for award. On April 30, 1976 Westinghouse authorized GE Sunnyvale to place the work order for the sodium pump-drive system with GE Schenectady.

BBC protested the award of this subcontract by letter of June 3, 1976 to ERDA. ERDA denied this protest by letter of August 5, 1976, received by the protester on August 8, 1976. BBC then filed its protest with this Office.

Our Office will consider subcontract protests only in limited circumstances. As set forth in Optimum Systems, Inc., 54 Comp. Gen. 767 (1975), 75-1 CPD 166, we will consider a protest against the award of a subcontract where the Government controls or directs the selection award. BBC argues that we should assume jurisdiction

in the instant case because ERDA not only participated in the selection, but also made the basic decision that resulted in the selection. ERDA, on the other hand, argues that the only active part it took with respect to the protested subcontract was to approve it. However, ERDA did direct Westinghouse to conduct the award selection and to consider the proposals of GE Schenectady and BBC. This action was taken by ERDA so that one GE division would not have to evaluate the proposal of another GE division, and while we understand why ERDA felt it necessary to take this action, we believe that ERDA in effect assumed control of the selection process. Once it did that we see no material difference between ERDA's conducting its own evaluation and, as was done here, directing its prime contractor to conduct the evaluation of proposals. Therefore, we will consider this protest.

BBC argues that the application of the Buy American Act to its proposal was erroneous. It maintains that the sodium pump-drive system is not an end product within the meaning of the Act but merely a small component of the entire liquid metal fast breeder reactor and as such was not subject to the application of the Buy American Act differential.

The RFP which was transmitted to BBC on June 20, 1975 contained the requirement of compliance with the Buy American Act as set forth in the ERDA procurement regulations (41 C.F.R. § 9-59.004, § 9-6.100(b) (1976)) and Subpart 1-6.1 of the Federal Procurement Regulations (FPR). BBC does not dispute the inclusion of the Buy American Act provision but argues that FPR § 1-6.102 subjects only foreign "end products" to the Buy American provisions. In BBC's view the sodium pump-drive system is a component of the breeder reactor to be delivered under the Westinghouse contract, not the end product itself.

In reply, ERDA points out that the Buy American Act clause of FPR § 1-6.104-5 was included in the Westinghouse contract, the GE Sunnyvale subcontract and the solicitation for the sodium pump-drive system. That clause defines "end product" and "component" as follows:

"(1) 'Components' means those articles, materials, and supplies which are directly incorporated in the end products;

"(ii) 'End products' means those articles, materials, and supplies which are to be acquired under this contract for public use."

Using these definitions ERDA concludes that the end product to be acquired under the instant procurement is a sodium pump-drive system.

We agree. We stated in 46 Comp. Gen. 784, 791 (1967) that "as to a given contract the end product is the item to be delivered to the Government as specified in the contract." The purpose of the GE Sunnyvale solicitation and the item to be delivered under the protested subcontract is the sodium pump-drive system, not the breeder reactor. In this regard, protester's reliance on 47 Comp. Gen. 21 (1967) is inappropriate. There the prime contract, which called for delivery of a diesel electric unit, included the Buy American Act clause which required the prime to deliver only domestic end products. There was no indication in the record, however, that a similar clause was included in the contract between the prime contractor and the supplier of the industrial storage batteries of Italian origin required as part of the diesel electric unit. We held that the diesel electric unit was the "end product" being procured under the contract containing the Buy American Act clause and that the batteries were components of that end product. Here, the subcontract for the sodium pump-drive system contains the Buy American Act provision in accordance with ERDA procurement regulations. The item being procured under this subcontract is the sodium pump-drive systems and therefore it is the end product being supplied, even though GE Sunnyvale will incorporate the liquid sodium pump into the heat transfer system. In a similar situation we held that there is no inconsistency between a given article's classification as an end product under a particular procurement and its subsequent classification as a component under another contract under which that article will be incorporated into a different end product. 48 Comp. Gen. 384 (1968). Accordingly, we believe BBC offered a foreign end product and that the application of the Buy American Act clause to the BBC proposal was proper.

BBC also argues that the public interest mandated waiver of the Buy American requirements in this case because its items were manufactured in Switzerland. Waiver of these requirements is possible where the agency head determines that the purchase of the domestic article is inconsistent with the public interest. The purchase

B-187252

of the domestic GE Schenectady article is inconsistent with the public interest, according to BBC, because a memorandum of understanding between the United States Department of Defense (DOD) and the Government of Switzerland relating to the purchase of aircraft by Switzerland from U. S. sources called for offsetting purchases to be placed to the greatest extent possible with Swiss industries. On February 13, 1976 DOD requested that in accordance with the memorandum of understanding ERDA waive the Buy American Act with respect to BBC's proposal. BBC feels that the existence of this memorandum and the DOD request were in themselves a sufficient public interest factor to dictate waiver of the Buy American Act. In support of this proposition BBC cites 51 Comp. Gen. 195 (1971) where, it is argued, it was held that the existence of a similar agreement between the United States and Norway justified waiver of the Buy American Act restrictions in the case of a procurement from Norwegian sources.

In that case, however, we merely recognized that the waiver was a matter of discretion vested in the contracting agency and not in our Office. See 41 Comp. Gen. 70, 73 (1963); Maremont Corporation, 55 Comp. Gen. 1362 (1976), 76-2 CPD 181. As we said in 41 Comp. Gen., supra:

"\* \* \* the question whether a particular purchase is inconsistent with the public interest, and should be exempt from the limitation fixed by law, is for determination by the head of the Department or agency concerned, and failure to exercise that vested authority, as in this case, is not subject to review by the accounting officers of the Government."

Accordingly, we cannot object to ERDA's refusal to waive the Act's application in this case.

BBC next contends that Westinghouse's failure to inform BBC during the course of negotiations that its price escalation proposal was unacceptable violated Westinghouse's duty to negotiate fully and fairly with all offerors. BBC maintains further that Westinghouse should have informed BBC prior to award that it disagreed with BBC's projection and that it intended to utilize a much higher projection.

Briefly, the RFP instructed offerors as follows:

"3.1 A fixed price proposal with escalation for material and labor cost is being solicited.

3.1.1 Offeror shall set forth his proposal and formulas with appropriate implementation language using March 75 dollars as the base.

3.1.2 Offeror shall demonstrate relativity of proposed indices and formulas to work here under. Experience over the recent five year period is considered appropriate. If proposal indices are not recognized National indices, Offeror will present evidence of the indices life expectancy.

3.1.3 Offeror shall identify:

3.1.3.1 Projected labor dollar expenditure over time, and

3.1.3.2 Projected material dollar expenditure over time for major material components."

BBC submitted a price proposal in accordance with these instructions, including a detailed price escalation formula together with Swiss labor and material indices from 1969 to mid-1975.

During negotiations BBC was informed that it had failed to respond properly in accordance with the RFP instructions. In response BBC provided the following:

"5. Effect of Escalation based on historical data to June 1975: Dollars: On estimated figures, not binding First supply June 75 approx. 1.10 million dollars (11%).

"Second supply December 79 approx. 6.87 million dollars (19%) Total approx. 7.97 million dollars (17.9%) Result approx. 9.396 million dollars revised total for supplies. Technical assistance and services Escalation estimated at approximately 20 percent of per diem rates."

BBC also wrote:

"The figures given are based on trend extrapolation, based on most recent development data and estimates for the near future, not a statistical method."  
(Emphasis added.)

The minutes of the negotiation conducted after the submission of this data between BBC and Westinghouse indicate that Westinghouse accepted the explanation of how BBC arrived at its projection.

BBC maintains that it was not until after contract award that it was informed that the escalation rate applied to its proposal had been increased by Westinghouse to 27.5 percent through the use of a "least squares" method of projecting escalation rates. BBC argues that it should have been informed of Westinghouse's intentions and been afforded an opportunity to comment on the appropriateness of the least squares method or to revise its price escalation proposal based on an anticipated evaluation which would use the "least squares" method of projection. According to BBC the failure of Westinghouse to so inform BBC violated Westinghouse's duty to negotiate fully and fairly with all offerors.

We disagree with this contention. The affidavit of BBC's Assistant Vice President indicates what was communicated to BBC during negotiations:

"4. During a fact finding session held in December, 1975, at General Electric's offices in Sunnyvale, California, Brown Boveri's representatives were told by Westinghouse that Brown Boveri's method for arriving at the 17.9% projected escalation was acceptable. During the same meeting Brown Boveri was informed by Westinghouse that Westinghouse would make an independent calculation of the projected escalation, using most probably a method of least squares." (Underscoring supplied.)

Thus it appears that BBC in fact was informed by Westinghouse that while its method of projecting escalation was acceptable, Westinghouse would make its own independent projection. The affidavit also indicates the method which would probably be used--the "least squares" method. In any event, we do not think Westinghouse was required to conduct negotiations with BBC as to the method it used for calculating the rate of escalation. So long as the method used was reasonable and consistent with the RFP evaluation criteria, we have no basis



to object. In this regard, we have recognized that contracting agencies may independently estimate the likely cost to the Government of an offeror's proposal and that the agencies' judgment as to methods used in developing the estimate are entitled to great weight. See, e.g., Raytheon Company, 54 Comp. Gen. 189 (1974), 74-2 CPD 137. Here, we see nothing in the RFP which required the BBC method in lieu of the method used by Westinghouse.

As for the reasonableness of the Westinghouse method, BBC argues that it failed to account for domestic changes in the Swiss economy in 1974 and 1975. BBC explains that the overall Swiss wholesale price index and the individual indices for iron, steel and copper have actually declined while the U.S. composite indices have risen. It is argued that the failure to account for these trends in the evaluation of price escalation is clearly in error.

However, the RFP stated that "experience over the recent five year period is considered appropriate." Data was submitted by BBC in accordance with this requirement from 1969 through the third quarter of 1975. This data was used in the evaluation of the BBC proposal. It included data covering part of the period which BBC claimed would demonstrate a dramatic strengthening of the Swiss economy. The GE Schenectady proposal was evaluated in the same way, using data covering the same time frame supplied by GE. We cannot sustain BBC's contention in this regard.

Finally, BBC states that its analysis of the Westinghouse price evaluation revealed a fundamental error in the calculation of escalation:

"The Sliding-Price Formula submitted by BBC Boveri to determine the amount of escalation called for a comparison of price indices as follows: in the case of wages, the index at the time of tender with the arithmetic mean of the indices during the second half of the fabrication period; in the case of material (iron and steel, and copper), the indices at the time of tender with the arithmetic mean of the indices during the second third of the fabrication period. Fabrication period was defined as beginning with the release for fabrication and ending with the shipment. This formula was accepted by Westinghouse."

"The 'X-value' to be utilized in the Projection Equation for BBC should therefore have been the length of time between 12-1-72 (the base date for the Projection Equation) and the mid-point of the second half of the fabrication period in the case of wages, and the mid-point of the second third of the fabrication period in the case of materials. However, this is not how Westinghouse calculated the X-values for BBC. Instead, it simply deducted four months (0.33 years) from the period between the base date and the shipment date, to arrive at one X-value for both labor and materials for each shipment. The single X-value is enough to alert one to an error, since the BBC formula clearly must result in different X-values for labor and materials. Moreover, it is apparent that the only way in which a common deduction of 0.33 years for each shipment could be arrived at consistently with the BBC formula would be if there were to be a separate release for fabrication for each shipment, less than a year prior to the date of that shipment. Clearly this is not what was contemplated by the parties. Instead, a release for fabrication would have been given early in the life of the contract. Utilization of such a release date would result in a very substantial reduction in the X-values, and consequently a sizeable reduction in BBC's evaluated price."

ERDA explains the Westinghouse calculations as follows:

"Westinghouse agrees that at the time indices would have been calculated for use in contract price adjustments there would be different x-values for labor and materials, but it will be shown that the Westinghouse price projection calculations account for this fact and impose less escalation than using different x-values.

"Westinghouse used the midpoint of the eight month fabrication cycle for each shipment to calculate indices for both labor and materials. This is the same point as the material indices in BBC's sliding price formula. This point is two months prior to the labor index in BBC's sliding price formula. Due to the insignificant impact of this two month difference on the projected escalation cost for BBC labor, the fact that this impact was in BBC's favor, and to minimize the number of calculations,

Westinghouse used the same indices for both BBC labor and materials. In fact, this resulted in applying from a 2.3% lower BBC labor index to the labor elements of the BBC price."

"[The protester's] statement that it is apparent that Westinghouse subtracted .33 years from each shipment point based on separate fabrication periods is true. It is clear that BBC anticipated separate periods for fabrication of each of the three shipments shown in BBC's network \* \* \* which was submitted on November 16, 1975, in response to the RFP. GEFBRD's Schedule Proposal Instructions \* \* \* state, in part '2.1 The Offeror shall submit a diagram of his schedule, illustrating the timing and relationship of all task activities including constraint points, required inputs and outputs of each task.' During negotiations BBC's proposed three shipments were increased to eight shipments. Using the eight month fabrication period \* \* \* for the first seven shipments and the three month refurbishment period for the eighth shipment, Westinghouse calculated the labor and material indices using the method of least squares and the BBC sliding price formula. The facts outlined in this and the preceding paragraph do not support [BBC's] allegations of either a 'serious error' in the Westinghouse price evaluation or that the 'evaluation that was applied was incorrect in a number of respects.'"

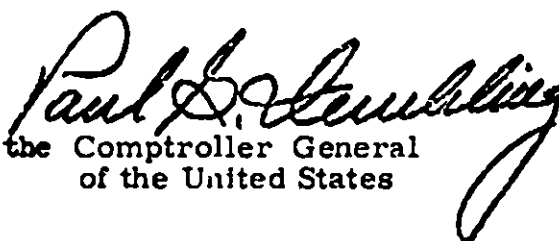
"Westinghouse recalculated the evaluated price for BBC \* \* \* using [BBC's] hypothesized release date of June 1, 1978 \* \* \* and concluded that even if the \* \* \* misstatement regarding a single fabrication period had been true, the BBC evaluated price would have been reduced by \$136,276 and would still have been high by \$295,578."

In our opinion Westinghouse has adequately responded to BBC's contention concerning indices for labor and materials. It has been shown that the use of the single x-factor, while not strictly following the BBC escalation formula, resulted in the imposition of less escalation than using different x-values and was thus more favorable to BBC. With regard to the BBC argument concerning the earlier release date Westinghouse points out that even if the earlier release date urged by BBC had been utilized by Westinghouse, the GE Schenectady proposal still would have been lower than BBC's.

B-187252

With regard to BBC's claim for proposal preparation costs, the courts have recognized that offerors are entitled to have their proposals considered fairly and honestly and that recovery of preparation costs is possible if it can be shown that proposals were not so considered. However, lack of good faith, arbitrariness or capriciousness must be established as prerequisite to recovery. See Keco Industries Inc., v. United States, 492 F. 2d 1200 (Ct. Cl. 1974). As indicated above we find that BBC's proposal was fairly considered.

Accordingly, BBC's protest and its claim for proposal preparation costs are denied.

  
For the Comptroller General  
of the United States